No. 87-1555

In The
Supreme Court of the United States
October Term, 1987

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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The California Employment Law Council ("CELC" or "*amicus*") submits this brief as *amicus curiae* to urge the Court to review the holding below that regulations of the Federal Railroad Administration mandating blood and urine testing of railroad employees involved in specified train accidents and fatal incidents, and authorizing breath and urine tests after specific accidents, incidents and rule

infractions, violate the Fourth Amendment since they do not require "individualized" suspicion of drug or alcohol impairment prior to testing.[1]

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INTEREST OF AMICUS CELC

CELC is a voluntary nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. *Amicus* was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices. CELC members do business throughout the Ninth Circuit, and thus must adhere to its rulings.

While governmental entities such as petitioner are not members of CELC, *amicus* represents many private companies within industries subject to extensive governmental regulation designed to promote safety of employees and the public. In addition, virtually all of CELC's members, in the operation of their businesses, rely upon heavily regulated industries, and particularly transportation, to provide safe and reliable services. Many of these companies handle and require the transport of commercial products which could endanger the public in the event of a serious accident. Moreover, numerous CELC members have embarked upon comprehensive safety programs to ensure the well-being of their employees and the public, and these programs entail the prevention of substance abuse in the workplace.

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[1] Petitioners and Respondents have consented to the filing of this brief.

In promulgating the regulations in this case, the Federal Railroad Administration ("FRA") sought to achieve safety objectives which are of great concern to CELC and its members, to wit, "to prevent accidents and casualties . . . that result from impairment of employees by alcohol or drugs" [49 CFR 219.1(a)]. Further, many CELC members, in order to assure a safe working environment, have developed substance abuse policies which, like the regulations in issue, require urine testing of employees after certain accidents, incidents, and rule violations, without a showing of "individualized" suspicion. Notwithstanding that CELC members are in the private sector, and therefore not subject to Fourth Amendment prohibitions,[2] the clarification of drug testing issues in this case will undoubtedly impact all employers. Indeed, the Ninth Circuit has already applied *Burnley* to a private sector, post-accident testing program, holding that its "individualized suspicion" requirement was "readily applicable". *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087, 1093 (9th Cir. 1988).[3]

Accordingly, *amicus* has a strong interest in the outcome of this matter. CELC believes that the Ninth Circuit's decision unjustifiably frustrates the proper regulation of employee and public safety and erroneously restricts legitimate substance abuse testing.

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[2] *United States v. Jacobsen*, 466 U.S. 109 (1984). While the Fourth Amendment applies primarily to public sector employers, courts have applied its protections in the private sector where significant government involvement is present. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991 (1982).

[3] A petition for review of the Ninth Circuit's decision in *Burlington Northern* was filed with the Court on April 1, 1988 (Docket no. 87-1631).

REASONS FOR GRANTING THE WRIT

In ruling that individualized suspicion is necessary before drug screening can be implemented under the FRA's post-accident testing regulations, the Ninth Circuit has rendered a decision which conflicts with the decisions of every other federal court of appeals which has dealt with the drug testing issue. *National Treasury Union v. von Raab,* 816 F.2d 170, (5th Cir. 1987), *cert. granted,* No. 86-1879 (Feb. 29, 1988); *McDonell v. Hunter,* 809 F.2d 1302 (8th Cir. 1987); *Jones v. McKenzie,* 833 F.2d 335 (D.C. Cir. 1987); *Shoemaker v. Handel,* 795 F.2d 1136 (3rd Cir.), *cert. denied,* 107 S.Ct. 577 (1986); and *Division 241 Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976). The Ninth Circuit's contrary position rests upon its determination that the other circuits did not consider "precisely the factors we consider relevant" (*von Raab*); reached a decision "without very thorough analysis" (*Suscy*); incorrectly reasoned that "urine testing is a lesser intrusion than body searches" (*McDonell*); and adopted a "rationale [not] applicable to the employees in our case" (*Shoemaker*). The Ninth Circuit's opinion in *Burnley* has introduced conflict and confusion to the issue, and review is highly desirable and appropriate.

Further, review is warranted because the Ninth Circuit decision, together with the other circuit court opinions which have addressed drug testing issues, raises important questions of federal law which have not been, but should be, settled by this Court. The new technology of drug testing, the exponential escalation of substance abuse in the workplace, and the tragic endangerment of employees and

the public as a result of drug-related accidents have spawned a plethora of search and seizure cases which cry out for authoritative resolution and guidance. Since the scope of Fourth Amendment protections has not previously been considered by this Court in the context of drug screening and critical safety interests, review is most appropriate.

I. FACTS AND SUMMARY OF POSITION

A. Facts

Since the facts have been fully described in petitioners' brief, CELC will highlight certain areas which underscore that review is warranted.

After several years of rulemaking, pursuant to its delegated authority under the Federal Railroad Safety Act of 1970, the FRA promulgated regulations designed to prevent accidents, injuries and property losses due to alcohol and drug impairment of railway employees. The regulations were finalized after the FRA considered extensive safety data and evaluated the viewpoints of industry, labor and the general public.

It is important to emphasize that the regulations in question require railroads to conduct blood and urine testing only in *limited* situations where railroad employees are "directly" involved in a "major train accident,"[4] and authorize railroads to conduct breath and urine tests

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[4] Subpart C (49 C.F.R. 219.201-213) defines a "major" accident as one which involves a fatality, the extensive release of hazardous material, or a reportable injury or damage of $50,000 or more. (49 C.F.R. 219.201, 203).

where two supervisors have "reasonable suspicion" that an employee is under the influence of or impaired by alcohol or drugs, based upon specific observations concerning the appearance or behavior of the employee. In addition, the regulations provide procedural safeguards for employees, including the right to disciplinary hearings and the right to insist upon blood testing for the most accurate determination of impairment.

When respondents challenged the regulations on constitutional and statutory grounds, the district court granted summary judgment for petitioners, ruling that the governmental interest in railway safety for employees and the general public was paramount. The lower court noted that "objective" triggering events were necessary to justify testing, and that the regulations made a "genuine attempt" to reasonably limit the scope of the testing requirements. Finding the railroad industry to be "pervasively regulated," the court applied the standard of constitutional scrutiny for administrative searches, and found the tests reasonable in light of the government's interest in safety.

The Ninth Circuit reversed, holding that "individualized suspicion" was required before drug testing could be "justified at its inception" so as to meet Fourth Amendment requirements. The court refused to apply the administrative search standard and ruled that the tests were not "reasonably related" to improving rail safety, as they could not detect current drug intoxication or degree of impairment. The Ninth Circuit concluded that the Fourth Amendment required "observable symptoms of impairment with a positive [test] result," and not just involvement in an accident, to provide a "sound basis" for drug testing and potential disciplinary action.

B. Summary of Position

The Court should grant certiorari for two reasons. First, review is necessary to resolve the conflict among the circuits on the issues presented. Employers that require drug testing upon the occurrence of an accident are at a total loss to determine which precedent to follow. This is particularly true where, as in the case of many CELC members, employers do business throughout the United States and find it impossible to reconcile the inconsistent rulings. Review is highly desirable and necessary to achieve clarity and uniformity in the law.

Second, the Court should review the Ninth Circuit's decision because it presents an issue of major legal significance and is seriously flawed in its constitutional analysis. The court did not balance the competing interests which should have been considered under the "reasonableness test" required by the Fourth Amendment. The Ninth Circuit's failure to weigh factors of safety and health, which have been consistently recognized as compelling by other circuit courts, has resulted in an erroneous decision on a critical constitutional question.

Given the confusion and uncertainty engendered by the Ninth Circuit's opinion, it is imperative that this Court provide direction as to the weight to be accorded the government's interest in public and employee safety. While the Court has recognized the need for guidance in the drug testing area by granting certiorari in *National Treasury Union v. von Raab*, No. 86-1879 (Feb. 29, 1988), *amicus* urges that *von Raab* does not present the paramount issue of public safety. That issue is central to *Burnley*, and review in this case is essential to address public safety as a basis for testing.

II. REVIEW IS NECESSARY TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUIT COURTS

The Court should grant certiorari because the Ninth Circuit's decision is hopelessly inconsistent with the reasoning of five other circuit courts, and strays from the constitutional standards enunciated in this Court's prior opinions.

The Fourth Amendment protects individuals against searches and seizures that are "unreasonable." As this Court has defined that protection, it has become clear that:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). This Court focuses on two factors in determining whether a given search is reasonable, and hence constitutional, under the Fourth Amendment: (1) the degree to which it intrudes upon the individual's legitimate privacy expectations, and (2) the importance of the government interests underlying the search. Only through careful balancing of these two opposing interests can the constitutional reasonableness of a particular search be determined.

A. The Ninth Circuit's Rejection Of The Government's Public Safety Justification Conflicts With The Opinions Of Other Circuits

In finding that the FRA's drug testing program was not justified by the government's interest in public safety, the Ninth Circuit clashed with the holdings of every other

circuit court which has addressed the issue. The Ninth Circuit properly stated that determining the reasonableness of such a program "requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.' "[5] However, in applying that standard, the Ninth Circuit "failed to engage in the balancing of interests required by [the Supreme] Court." 839 F.2d 575, 597 (Alarcon, J. dissenting).

All three circuit courts that reviewed drug screening in safety-sensitive industries prior to *Burnley* upheld the testing in light of compelling safety concerns. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the Seventh Circuit addressed the constitutionality of a drug testing program in a factual setting very similar to this case. *Suscy* involved rules of the Chicago Transit Authority requiring testing for alcohol or drug usage of operating employees immediately following a serious accident. The Seventh Circuit discussed the nature of the employees' Fourth Amendment rights, but found that those rights were outweighed by the employer's "*paramount interest in protecting the public* by insuring that bus and train operators are fit to perform their jobs." *Id.* at 1267 (emphasis supplied).

In *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia had instituted a program involving

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[5] Quoting *O'Connor* v. *Ortega*, 127 S.Ct. 1492 (1987). As a framework for applying the balancing test, the Ninth Circuit adopted the two-prong test established by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968), inquiring whether the drug testing was (1) "justified at its inception," and (2) "reasonably related in scope" to the problem being addressed.

the routine testing of certain school employees for drug use. The tests, administered as part of the employees' periodic physical examinations, were required for all bus drivers, mechanics, and bus attendants. In evaluating the constitutionality of the program, the Circuit Court balanced the intrusion on Fourth Amendment privacy interests against the government interest involved. The court acknowledged that "strong privacy interests" were implicated by the testing program, but noted the existence of "*serious* safety concerns on the other side of the balance." *Id.* at 340 (emphasis in original). In reconciling these interests, the court stated that "a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or others." *Id.* Given the existence of such a compelling interest in physical safety, the Circuit Court held the testing program to be reasonable, and thus constitutional.

Finally, the Eighth Circuit upheld the drug testing of prison employees in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987). There, the Iowa Department of Corrections adopted policies requiring correctional employees to submit to urine tests upon the request of Department officials. The court, while finding that such testing plainly implicated the employees' Fourth Amendment rights, upheld the drug screening "in light of the difficult burdens of maintaining safety, order and security that our society imposes on those who staff our prisons." *Id.* at 1306. In so holding, the Eighth Circuit was sensitive to the fact that "the institutional interest in prison security is a central one." *Id.* at 1308.

In contrast to these decisions, the Ninth Circuit in *Burnley* completely circumvented any discussion of the government's legitimate and compelling concern for public

safety. Yet it is the weight of that concern, when balanced against the individual's privacy interest, that establishes the constitutional reasonableness of the testing. The FRA regulations were promulgated in response to grave problems involving alcohol and drug abuse in the railroad industry. Employee use of drugs and alcohol in transportation poses serious hazards to the safety of co-workers and the general public. That fact was recognized by each of the other circuits to address this issue, as well as by the district court and the Railway Labor Executives' Association in this case.[6]

Notwithstanding the compelling nature of the government's concerns for public safety, the Ninth Circuit focused its analysis "solely on the degree of impairment of the workers' privacy interests." 839 F.2d 575, 597 (Alarcon, J. dissenting). The majority's analysis in *Burnley* is contrary to the holdings in *Suscy, Jones* and *McDonell*, and reflects the Ninth Circuit's de facto abandonment of the balancing test established by this Court in its numerous decisions addressing the reasonableness of searches under the Fourth Amendment.

B. The Ninth Circuit's "Particularized Suspicion" Standard Is Improper And Contradicts The Holdings Of Other Circuit Courts

In spite of its recognition that "[t]he Supreme Court has not yet determined whether . . . there must be individualized or particularized suspicion" to justify a search under the Fourth Amendment, the Ninth Circuit con-

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[6] The district court found that testing served the government's interest in "railway safety, safety for employees, and safety for the general public." The RLEA concedes that substance abuse poses serious threats to the safe operation of the nation's rail systems.

cluded that such suspicion "is essential to finding toxicological testing of railroad employees justified at its inception." That conclusion is inconsistent with principles of law established by this Court, and contradicts the holdings of the other circuits that have addressed the issue.

1. The Ninth Circuit standard is inappropriate in light of prior Supreme Court rulings

Under prior decisions of this Court, a search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence [of the suspected impropriety]." *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). The Ninth Circuit noted that the Court has expressly reserved the question of whether particularized suspicion is an irreducible minimum under the "reasonable grounds for suspecting" standard. Nevertheless, in the very next sentence of its opinion, the Ninth Circuit adopted the particularized suspicion standard, describing such suspicion as "essential" to the permissible testing of railroad employees. The court then concluded that "accidents, incidents or rule violations" cannot, in and of themselves, justify the imposition of drug testing.

Not only does the Ninth Circuit's opinion proclaim a new standard for drug testing, it simultaneously announces that serious accidents and rule violations cannot form a constitutionally adequate basis upon which to base a testing program. Thus, under *Burnley*, drug testing is prohibited even though a linkage between employee drug use and serious accidents exists *unless* the employer can demonstrate a basis for suspecting drug usage by each individual to be tested. The Ninth Circuit ruled that such a prerequisite to testing "poses no insuperable burden on the

government." On the contrary, requiring particularized suspicion prior to testing effectively precludes timely discovery of drug use.[7] Such a requirement severely limits the ability of employers to identify and remedy drug problems and hampers efforts to prevent the recurrence of serious accidents and fatalities.[8]

2. Other circuits have consistently upheld testing in the absence of particularized suspicion

Prior to *Burnley* all five of the circuit courts that addressed the propriety of drug testing in the absence of particularized suspicion upheld such testing as "reasonable." In *Susey*, the Seventh Circuit viewed involvement in a serious accident sufficient to warrant testing in light of compelling safety interests. In *Jones*, where the school system's drug screening was conducted as part of the routine physical examination given each employee, the testing was upheld. Similarly, in *McDonell*, the Eighth Circuit found testing constitutional despite the fact it required no showing of particularized suspicion.

Two other circuit courts have upheld drug testing programs without requiring individualized suspicion. In

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7 This is especially true where, as in the railway industry, employees often work in isolation from others and are not subject to frequent supervisory observation. Further, as the district court noted in its opinion, "the disappearance or loss of [evidence of drug usage]" poses a serious problem where testing is not conducted immediately following an accident.

8 The Ninth Circuit concluded that testing was not "reasonably related" to railway safety since tests by themselves cannot conclusively establish current impairment. However, the FRA testing guidelines clearly demonstrate that the results of drug tests are considered *along with other relevant data* in making the ultimate determination of impairment. In fact, the notice to employees concerning testing recognizes that blood tests only provide information "pertinent to current impairment."

Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986), the Third Circuit reviewed the constitutionality of New Jersey Racing Commission regulations requiring racing officials, jockeys, trainers and grooms to submit to breathalyzer and urine testing at the direction of the State Steward. Those regulations were part of a comprehensive regulatory scheme designed to assure public confidence in the integrity of the racing industry. The Third Circuit found the racing industry to be a "heavily regulated industry," and therefore applied the standard of reasonableness necessary to justify an administrative search. Under that standard, the court upheld the regulations as based on a strong state interest accompanied by the reduced privacy expectation of those persons employed in the industry.[9]

In *National Treasury Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988),

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[9] The Ninth Circuit struggled to distinguish the facts of *Shoemaker* from the instant situation, emphasizing that jockeys, as *persons* employed in the "regulatory activity," were "the principal regulatory concern." "In contrast," the court stated, "the extensive regulation of the railroad industry . . . has always been geared to assuring the safety and proper maintenance of *equipment and facilities*." The unpersuasiveness of this distinction is evident from the government's long tradition of regulating the conduct of railroad *workers* to promote public safety. As the dissent correctly noted, "the activities of railway *personnel* are closely regulated to promote safety." Indeed, "an idle locomotive . . . is harmless. It becomes lethal when operated negligently by *persons*." 839 F.2d at 593. (Emphasis added.)

An additional distinction made by the Ninth Circuit related to the railway employees' expectations of privacy. While the jockeys in *Shoemaker* were subject to extensive regulation and thus possessed diminished expectations of privacy as to their physiological conditions, the Ninth Circuit found that railway employees' privacy expectations were not similarly diminished.

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the Fifth Circuit Court of Appeals expressly rejected the argument that individualized suspicion is constitutionally required for the drug testing of employees. There, the United States Customs Service adopted regulations requiring employees to submit to urine testing prior to transfer into sensitive drug enforcement positions. The Customs Service argued that the testing was justified to preserve the Service's integrity in drug enforcement operations. Finding the testing "incident to the primary business of [the Customs Service]" and "necessary to carry on [that] business," the Fifth Circuit found the testing program was warranted. In balancing the employees' privacy interests against the interest in institutional integrity, the court refused to adopt a standard of individualized suspicion. The court found that the Customs Service's compelling interest in uncovering drug usage was such that "the balance of interests precludes insistence upon 'some quantum of individualized suspicion'." *Id.* at 176-177, quoting *Delaware v. Prouse*, 440 U.S. 648 (1979).

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This distinction must also fail. The regulations provided railway employees with explicit notice of accident testing procedures, and of the right to blood testing to "provide information pertinent to current impairment." Given the railroad industry's historical emphasis on safety, and the specific notice of these regulations, the railway employees' expectations of privacy were identical to those found to be diminished in *Shoemaker*.

Accordingly, as in *Shoemaker*, the administrative search standard should have been applied. In fact, since the regulatory scheme in *Burnley* arises out of compelling public safety concerns not present in the horse racing industry, the administrative search standard is *more* appropriate here than in *Shoemaker*. To allow drug testing of jockeys while prohibiting testing of railroad employees would be absurd in light of the much greater threat to public safety present in the transportation industry.

III. REVIEW SHOULD BE GRANTED TO ADDRESS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

As the facts of *Burnley, Jones, McDonell* and *Suscy* demonstrate, drug use poses serious health and safety hazards for employees and the public. The scope of drug abuse in this country has expanded greatly, rendering employee intoxication one of the foremost causes of workplace accidents. Employers and regulatory agencies are turning increasingly to drug testing as a means of identifying substance abuse and responding to critical safety and health problems. At the same time, the technology of drug screening has raised legitimate concerns about intrusions upon personal privacy, making the permissibility of employee testing the subject of widespread litigation and debate.

This controversy results, in part, from the fact that drug testing in safety-sensitive industries has never been addressed by this Court. The conflicting decisions of lower courts that have grappled with this issue illustrate both its growing importance and the need for authoritative guidance. In the absence of such guidance, the right to test employees and the manner in which testing can be implemented often correspond more closely to the jurisdiction in which testing takes place than to the proper balancing of safety and privacy concerns. For example, while safety concerns have been recognized as adequate justification for employee drug testing in most of the cases addressing

the issue,[10] those concerns have been found inadequate by other courts in even the most compelling settings.[11]

The two central issues that underlie the courts' inability to resolve drug testing disputes are the weight to be accorded health and safety concerns and the adequacy of generalized suspicion to justify employee testing. In *Suscy, McDonell* and *Jones,* the courts found that the weight of the employer's interest in employee and public safety was adequate to justify testing, even though no individualized suspicion was demonstrated. Significantly, these issues are at the core of the dispute between the majority and dissent in *Burnley,* and are thus properly framed for resolution by this Court.[12] Review of *Burnley* would

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[10] Drug testing programs have been upheld by courts in a variety of contexts. The most notable of these decisions include *Allen v. City of Marietta,* 601 F. Supp. 482 (N.D. Ga. 1985) (municipal utility employees); *Burka v. New York City Transit Authority,* No. 85 Civ. 5751 (S.D.N.Y., Feb. 1, 1988) (mass transit workers); and *Turner v. Fraternal Order of Police,* 500 A.2d 1005 (D.C.App. 1985) (police officers).

[11] *See, e.g., National Federation of Federal Employees v. Carlucci,* No. 86-0681 (D.D.C. Mar. 1, 1988) (pilots, air traffic controllers, and mechanics); and *Lovvorn v. City of Chattanooga,* 647 F. Supp. 879 (E.D. Tenn. 1986) (firefighters). The Eighth Circuit's opinion in *McDonell* reversed the district court's holding that testing of correctional employees violated the Fourth Amendment.

[12] Indeed, the magnitude of the issues in this case—and the flawed nature of the Ninth Circuit's analysis of drug testing programs—is underscored by that court's recent decision in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company,* 838 F.2d 1087 (9th Cir. 1988). There, in finding that the implementation of a *private* sector, post-accident testing

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allow this Court to resolve issues of critical constitutional import and provide needed guidance to the lower courts.

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program violated a collective bargaining agreement, the court relied upon Fourth Amendment principles:

> Our analysis here is aided by reference to fourth amendment doctrine. [Burlington Northern] is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment. However, the focus of our inquiry—both under the fourth amendment and an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing.

Id. at 1092.

Reasoning that a railroad worker's expectations of privacy under a collective bargaining agreement "are related" to privacy expectations under the Fourth Amendment, the court found *Burnley's* requirement of individualized suspicion to be "readily applicable":

> Although the source of the invasion is different, the privacy interest is the same. In the case of urine testing programs the Constitution draws a line between those programs based on particularized suspicion and those based on generalized suspicion. [Citing *Burnley*]. The former are permissible; the latter are not.

Id. at 1093.

The Ninth Circuit, without citing any supporting authority, *applied Fourth Amendment standards to drug testing in the private sector.* Further, it expressly adopted *Burnley's* particularized suspicion standard. As the dissent properly pointed out, this ruling goes far beyond the well accepted limitation of Fourth Amendment principles to "*governmental* intrusions."

Review of *Burnley* is critical not only because of its immediate impact on public sector employers, but also because of the clear implications for all employers should the Ninth Circuit be allowed to extend its analysis—as it already has in *Burlington Northern*—to employers in the private sector. By reversing *Burnley*, the Court can clarify the scope of Fourth Amendment protections and the importance of safety concerns in justifying drug testing programs. Further, by resolving the issues in *Burnley* in the manner *amicus* urges, the Court, in effect, would correct the Ninth Circuit's unwarranted application of Fourth Amendment principles to private sector, post-accident testing.

IV. THE COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE REGARDING IMPORTANT ISSUES NOT RAISED BY VON RAAB

CELC urges the Court to grant review notwithstanding that certiorari has been granted in the *von Raab* case. The issues in *von Raab* are narrowly focused upon the interests of a governmental agency, the Customs Service, to assure the honesty and integrity of its operations in dealing with drug smuggling. Testing in that case included *all* employees who sought promotions to drug enforcement positions. In contrast, the drug testing in *Burnley* is tied to the occurence of serious accidents, and thus focuses upon the more universal issue of public safety and the safe performance of vital services. The far-reaching impact of the drug testing in *Burnley*, designed to assure safety in an industry inextricably interwoven throughout our business and private lives, provides the Court with an excellent opportunity to give guidance on a matter of great legal and societal importance.[13]

Indeed, by considering both *von Raab* and *Burnley*, this Court can resolve important and complementary issues which have taken center stage in Fourth Amendment search and seizure litigation. Courts have been inundated with legal challenges to drug testing programs, and guidance

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[13] *von Raab* and related decisions like *McDonell* and *Shoemaker* fall within a category of cases involving security and corruption in regulated entities. In contrast, *Burnley* involves safety-sensitive jobs which, if performed while under impairment, can result in fatalities or serious injuries. Regardless of the outcome in *von Raab*, the important and far-reaching issue of public endangerment in safety-sensitive industries would not be resolved. Given the compelling nature of the safety interest in *Burnley*, review would allow the Court to clearly address this critical issue.

is greatly needed to assure compliance with constitutional requirements and minimize unnecessary litigation. Given the difficult process of balancing conflicting interests under the Fourth Amendment, clarification as to the weight of safety concerns under the Court's reasonableness test is highly desirable.

It is urged that the Court not hold this matter in abeyance pending the outcome of *von Raab*, as to do so would result in the loss of an important opportunity to provide authoritative direction in an area permeated with uncertainty and confusion. Accordingly, CELC requests that the Court grant review of the petition herein and give full consideration to the issues raised, together with those already before the Court in *von Raab*.

V. CONCLUSION

The Court should grant the petition for certiorari in order to resolve the conflict in the circuits and affirm that legitimate safety concerns justify post-accident drug testing in the absence of individualized suspicion.

Dated: April 15, 1988

Respectfully submitted,

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